

No. ~~05~~-604 SEP 13 2005

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In The
Supreme Court of the United States

NORTH PACIFICA LLC,

Petitioner,

v.

CITY OF PACIFICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Court Of Appeal Of The State
Of California, First Appellate District**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does California's appellate court system deny the constitutionally guaranteed right of due process wherein it makes no provision for a party to disqualify a biased appellate panel *and* there is no guaranteed right to a review, by a court of superior jurisdiction, of any decision rendered by such a biased appellate panel?

2. Does it violate the equal protection clause of the Fourteenth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, on its face,

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent, and

(b) makes up law that applies *only* to this plaintiff, and no other person, where

(c) there is no guaranteed right of review, and

(d) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

3. Does it violate the due process clause of the Fourteenth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, on its face,

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent, and

(b) makes up law that applies *only* to this plaintiff, and no other person, where

QUESTIONS PRESENTED – Continued

(c) there is no guaranteed right of review, and

(d) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

4. Does it violate the takings clause of the Fifth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, while, on its face, acknowledges the existence of a governmental taking of private property, nevertheless

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent,

(b) makes up law that applies *only* to this plaintiff, and no other person, and

(c) results in an uncompensated government taking, where

(d) there is no guaranteed right of review, and

(e) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

All parties are listed in the caption.

North Pacifica, LLC, has neither parent nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner North Pacifica LLC ("NP"), respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the California Supreme Court.

OPINIONS BELOW

The decision of the California Supreme Court Denying Review of the unpublished California First Appellate District Court decision, denying NP's Petition for Certiorari, and denying NP's Request for Publication was filed on June 15, 2005 (App. G). The appellate court's unpublished decision reversing the trial court's inverse condemnation award was filed on March 23, 2005 (App. A). Pertinent orders of the appellate court are its January 6, 2005 Order Sealing Documents and denying NP's Request for Recusal (App. B); its February 12, 2005 Order Denying NP's Request for Recusal (App. C); and its April 18, 2005 Order Denying NP's Petition for a Rehearing and also Denying NP's Request to publish the appellate court's March 23, 2005 opinion (App. D). The Trial Court's Statement of Decision, awarding judgment for inverse condemnation was filed on November 12, 2003 (App. E). The Judgment was entered on March 3, 2004 (App. F).

JURISDICTION

This case arises under the Fifth and Fourteenth Amendments of the Constitution. The California State Supreme Court refused to review and/or vacate an unpublished and clearly unconstitutional opinion of the appellate court, which, in itself, vacated and reversed a sound and

well supported and court judgment and award of just compensation, under the Fifth Amendment, in favor of Petitioner, for an inverse condemnation of Petitioner's property committed by a governmental entity.

The Appellate Opinion, while it conceded there was a governmental taking of Petitioner's private property, defied binding California and U.S. Supreme Court precedent in order to effect a politically popular but legally unsound, unfair and discriminatory result towards Petitioner. In so doing, the Appellate Opinion, ignored by the State Supreme Court, effected an uncompensated taking of Petitioner's property and made up law that not only defies established U.S. Supreme Court and California Supreme Court precedent but, because it is embodied in an unpublished and uncitable opinion, applies to no other person on the planet, except Petitioner. Petitioner contends such action violates Petitioner's Fifth Amendment right to just compensation and its Fourteenth Amendment rights to equal protection and due process.

In this case, California procedures have allowed a "runaway" rogue appellate panel to successfully (so far) evade the requirements of the Fifth Amendment's takings clause as well as the Fourteenth Amendment's due process and equal protection guarantees, by issuing an *unpublished* opinion that applies only to plaintiff herein, and no other person, and is intended to fly under the radar screen of an overworked and understaffed State Supreme Court.

Since, under *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), a takings plaintiff must bring its action in State Court in order to ripen it for consideration by a federal court, and under *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct.

2491, 2497 (2005), the State Court decision is *res judicata* for the purposes of any putative subsequent federal court action, the only remedy available for such evasive actions by a rogue appellate court would be review by the State Supreme Court. However, the unlikely prospect of State Supreme Court review which, statistically, under the best of circumstances, is a rarity, may be avoided, essentially altogether, by the simple expedient of issuing an *unpublished* opinion, which, because it has no precedential effect and cannot even permissibly be cited in other cases, garners little or no public interest.

In California, it is virtually impossible to obtain California Supreme Court review of an unpublished decision, regardless of how flagrantly the opinion flaunts the law or the Constitution.¹ For this reason, an appellate court may, by issuing an *unpublished* opinion, discriminate with impunity against politically unpopular plaintiffs by means of what is, essentially, a judicial bill of attainder. Since an unpublished opinion is not precedent in California, the procedure allows for selective prospectivity. The appellate court may flout and defy established *stare decisis* precedent of the U.S. Supreme Court and State Supreme Court, and even the Constitution, and selectively "make up" customized law in order to inflict it upon a single, politically unpopular individual without concern that its unfairness will infect any other person or faction, since, by California law, unpublished appellate opinions have no precedential effect and cannot even permissibly be cited in other cases involving other parties (Cal. Rules of Court, Rule 977 (App. O)).

¹ See, California Lawyer, July, 2005 "Revising Publication Standards," Gerald Uelman.

This potential abuse is far more insidious, however. A politically activist appellate court panel, unchecked by any real oversight, can "run interference" for local government officials that share the same political power bases and/or are elected by the same factions of voters. In order to curry the favor of such common constituencies or private interests, local officials have been known to expropriate private property without cost to or payment by voter/taxpayers' dollars, even where such takings, as here, have definitively been ruled by a trial court to be in violation of the Fifth Amendment. Thus, without any real, effectual oversight, a rogue appellate court panel, armed with the power to issue unpublished and effectively unreviewable opinions, is in practical terms, *the* court of last resort. As such, it can become, with little risk, effectively an accomplice to a politically popular, but, nevertheless, unconstitutional "theft ring" for private property.

This Court has jurisdiction under 28 U.S.C. § 1257 (App. H).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth and Fourteenth Amendments to the United States Constitution, along with pertinent federal and state statutes and rules are reproduced as Appendices H through O.

STATEMENT OF THE CASE

This case involves the politically popular refusal of the City of Pacifica ("City"), a virulently anti-development city,

to maintain one of its public streets, known as Edgemar Road ("Edgemar") thereby preventing access to and thwarting all economic use of the real property of petitioner North Pacifica ("NP"). NP owns seven lots in the City that are commonly referred to as the Fish lots, because they are located on a parcel that resembles a Fish. The sole access to the lots is via Edgemar, which is an abutting dedicated and accepted public, city street, which was improved in or about 1914 and was in regular and continuous physical use by the public as a thoroughfare for many decades.

Though the City never vacated Edgemar pursuant to the exclusive provisions of the California Streets and Highways Code for vacating or abandoning a public street, (and there is no other means recognized at law for vacating a public street) and, indeed, refused to vacate Edgemar when asked to do so by NP, the City, nevertheless, has not maintained Edgemar for many years and it is now overgrown, riddled with deep pot-holes and other obstacles, impassable to vehicular traffic and dangerous for pedestrian use. The City denied NP's application for a summary vacation of Edgemar and it has also refused to repair Edgemar, thus leaving the Fish lots effectively landlocked and depriving NP of all use and value of its property.

The trial court, after a six week bifurcated bench trial, which included a site visit by the Court, found that the City's refusal to repair and maintain Edgemar had permanently taken NP's property and awarded NP the full value of the lots in the amount of \$3,495,000, plus approximately \$1,200,000 in attorneys' fees and costs.

The California First Appellate District Court, Division Four, reversed the trial court in an unpublished opinion

based on its own "factual finding," which was contrary to the finding of the trial court, that the statutory limitation period had run. Under California Supreme Court precedent, the issue of the date on which the limitation period begins to run is an issue of fact that is specifically within the province of the trial court. (e.g., *Mehl v. People ex rel. Dept. Public Works*, 13 Cal.3d 710, 717 (1975)).² However, the appellate court brazenly overturned the trial court's decision based on the appellate courts own "finding" that the trial court's decision was not supported by the evidence, even though the trial below was a six week bench trial that had included a site visit, and copious expert testimony regarding the history of Edgemar including maps, aerial photographs etc.

In order to assert that the trial court's decision was not supported by the evidence, the appellate court simply ignored facts cited in the trial court's statement of decision (as well as all other trial evidence which supported the trial court's decision), as is apparent from a comparison of the two decisions. That the appellate court's unpublished opinion was a biased decision, designed to effectuate the politically popular anti-development sentiments of the vocal neighboring residents in Pacifica, is evident additionally from the appellate court's own concession, in the appellate opinion, that it relied on evidence *that was not in the record*, as well as from the appellate court's pervasive refusal to follow *stare decisis*, which is also apparent from the face of the decision.

² "The trial court's finding on the accrual of a cause of action for statute of limitations is upheld on appeal if supported by substantial evidence." *Institoris v. City of Los Angeles*, 210 Cal.App.3d 10, 17 (1989).